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QUESTION PRESENTED*

Was the court of appeals correct in invalidating a district court rule requiring that lawyers reside in the Virgin Islands in order to be licensed to practice law there?

*In addition to the parties identified on the cover, the Government of the Virgin Islands filed a brief as *amicus curiae* supporting petitioners in the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1939 and 87-2008

GEOFFREY W. BARNARD, Chairman of the Committee of Bar Examiners of the Virgin Islands,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN and LLOYD De VOS,
Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN and LLOYD De VOS,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

At issue here is a rule of the District Court of the Virgin Islands which requires members of that court's bar to reside in the Islands for one year before their admission and to continue to reside there afterwards. The court of appeals invalidated this rule under *Frazier v. Heebe*, 107 S. Ct. 2607 (1987), where this Court, in an exercise of its supervisory authority, struck down a similar federal district court rule. The decision below should be affirmed because *Frazier* is controlling

and also because the rule is unconstitutional under *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which invalidated a similar state court rule under the Privileges and Immunities Clause of Article IV.

STATEMENT OF THE CASE

A. *The Applicable Rule.*

The District Court of the Virgin Islands (the "District Court") was created by Congress in a statute now known as the Revised Organic Act of 1954 (the "Organic Act"), 48 U.S.C. §§ 1541-1645, which is the basic charter for the Islands. District Court judges are appointed by the President, with the advice and consent of the Senate, to ten year terms, 48 U.S.C. § 1614, and the District Court operates as a hybrid court. Although it was created under Article I of the Constitution, rather than Article III, it has jurisdiction over the kinds of cases heard by federal district courts. 48 U.S.C. § 1612(a). It also shares jurisdiction with the Territorial Court of the Virgin Islands (a trial court created by the Virgin Islands Legislature, 4 V.I. Code Ann.§§ 71-88) over various civil and criminal cases arising under territorial law. 48 U.S.C. § 1612(b). Finally, the District Court hears appeals from decisions of the Territorial Court, and the United States Court of Appeals for the Third Circuit hears appeals from cases which originate in District Court and those which are appealed to District Court from the Territorial Court. 48 U.S.C. § 1613a. *See* Appendix to Petition for Certiorari in No. 87-1939 ("Pet. App.") at 68a-73a.

Requirements for admission to the District Court bar appear in local Rule 56(b). 5 V.I. Code Ann., App. V., R. 56(b)(Pet. App. 78a). An applicant must take a two-day bar examination, as there is no way of being admitted on motion.

Apart from the usual character and educational requirements that appear in bar admission rules, an applicant must also "allege and prove to the satisfaction" of the Committee of Bar Examiners that he or she has "resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar," and that if admitted to practice, he or she "intends to continue to reside in and to practice law in the Virgin Islands." Rule 56(b)(4) and (5)(Pet. App. 78a). A lawyer who moves out of the Islands becomes an "inactive" bar member and can revert to "active" status only upon his or her return (J.A. 40). The District Court is the only court which licenses people to practice law in the Virgin Islands. Thus, a lawyer who cannot be admitted to its bar is denied a license not merely to litigate federal cases, but to practice law in any fashion there.

B. *District Court Proceedings.*

This case began in the spring of 1985, shortly after this Court's decision in *Piper*, when respondents applied to take the Virgin Islands bar examination scheduled for 31 July and 1 August 1985. Respondents practice law in New York City, and both are members in good standing of the New York and New Jersey bars. Neither respondent lives in the Virgin Islands, and their applications were rejected for that reason by petitioner Geoffrey W. Barnard, the Chairman of the Committee of Bar Examiners (J.A. 22-25, 30-31).

On 14 June 1985, respondents filed suit in the District Court of the Virgin Islands, asking that the residence requirements in Rule 56 be declared unconstitutional and their enforcement enjoined under the Privileges and Immunities Clause of Article IV of the Constitution, which Congress applied to the Virgin Islands in the Organic Act, 48 U.S.C. § 1561 (J.A.14-17). On

21 June 1985 the District Court allowed respondents to take the bar examination (which they both passed), while reserving a decision on the merits (J.A. 26-27).

Both sides moved for summary judgment, and petitioner Virgin Islands Bar Association (the "Bar Association") was allowed to intervene and to join Barnard's motion (Pet. App. 62a-63a n.5). The arguments for and against this rule tracked those made in *Piper*, which struck down a similar restriction that was also said to promote lawyer competence, ethics, availability for court appearances, and willingness to do *pro bono* work. 470 U.S. at 285-87. The parties also debated the adequacy of airline and telephone service to the mainland, which the Third Circuit cited in a 1973 decision which upheld the Virgin Islands' continuing residence requirement against an equal protection challenge. *Aronson v. Ambrose*, 479 F.2d 75, *aff'g* 9 V.I. 254 (D.V.I. 1972), *cert. denied*, 414 U.S. 854 (1973).

For example, respondent De Vos stated in an affidavit that he is a partner with a lawyer in a Virgin Islands law firm and that his responsibilities require him to travel frequently to the Islands and to communicate between the mainland and the Islands, as well as elsewhere in the world, on a regular basis (J.A. 32). He stated that he had travelled to the Islands 20 times in the preceding 18 months "on virtually every day of the week and nearly every month of the year," including the winter "tourist season," and that he had used the New York gateway, as well as Miami and San Juan; during this time, "I have never been unable to secure a reservation on a commercial flight for the day I desired to travel, even when I made my reservations on the day of or on the day before my intended travel date" (J.A. 32-33).

To buttress these statements, De Vos noted that the Virgin Islands are served by four major airlines (American, Eastern,

Pan American and Midway Express). During the tourist season they offer seven to nine flights daily in each direction, with five or six daily flights during other times of the year (J.A. 33). In addition to this non-stop service, one-stop service is available to a number of mainland cities through San Juan, Puerto Rico, which has at least a dozen daily flights to New York, Newark, Chicago, Philadelphia, Atlanta, Boston, St. Louis, Miami and Baltimore. Six commuter airlines provide this connecting service, and the St. Thomas-San Juan market is one of the five busiest commuter routes in the United States in terms of the number of passengers carried and the number of flights offered, with the St. Croix-San Juan market consistently among the top ten markets as well (*id.*).

De Vos stated that telephone communications from the mainland to the Islands are "at mainland standard," citing his twice-daily calls to the Islands when he is on the mainland and his 12 calls a day to the mainland and foreign countries when he is in the Islands (J.A. 33-34). He added that his St. Thomas office has Wide Area Telephone Service ("WATS"), as well as modern telex service and modern telefax machines that transmit facsimiles of documents over telephone lines (J.A. 34). He has found that "about 99 percent of my telephone connections to and from the Virgin Islands are made without the necessity for redialing," and while he has "occasionally" experienced static on the lines, "this does not happen significantly more often than in calls I make within the United States or locally in New York and New Jersey" (*id.*). Problems with the quality of telecopier or telex transmissions were also denied (*id.*).

As for assuring the ethics of non-residents, De Vos noted that mainland bar members could serve on the Committee of Bar Examiners and volunteered his own services. He added that the burden posed by non-resident applicants should be

slight since the Committee currently relies on the National Conference of Bar Examiners to compile character data on applicants (J.A. 35).

Finally, De Vos stated that concerns about a non-resident's availability for court dates could be addressed by having a Virgin Islands partner or other local counsel "who would be expected to be thoroughly familiar with the background and status of the case," and he noted that his colleagues in the Virgin Islands are fully familiar with proceedings that are pending there and can "handle any last minute problems that may arise while one of the attorneys may be unavailable" (J.A. 35-36).

In defending the rule, petitioner Barnard's affidavit devoted only three sentences to the issue of air service. He noted that air travel from the mainland to the Virgin Islands takes at least two and one-half hours and added without elaboration that during the tourist season, "reservations may be totally unavailable for commercial flights . . . for protracted periods of time" (J.A. 37). The two sentences dealing with telephone service were also highly conclusory. He acknowledged that service had "substantially improved in recent years," although in his view it was still "significantly less reliable than that normally expected within the Continental United States" and was marked by difficulty in securing a long distance connection and interference from "static, voice fade outs, transmission gaps, or disconnections" (J.A. 38). Mail delivery was also said to be "often unreliable" and to involve "material delay" (*id.*).

Barnard also expressed concern that non-residents might lack a "commitment" to the Islands and to staying abreast of developments in local law and that it would be difficult to police the ethical behavior of these lawyers (J.A. 38-39). He also cited problems experienced with non-resident lawyers who

are admitted *pro hac vice*, but who fail to appear at hearings, and whose local counsel are unprepared to handle the case (J.A. 40). He also expressed reservations that non-resident bar members could discharge their obligations under a local rule requiring lawyers to represent indigents in criminal cases which the public defenders are unable to handle (J.A. 40-41).

An affidavit from Bar Association President Patricia D. Steele was to the same general effect, adding only that there was a lag in the publication of court opinions (J.A. 44-45). Several months later, however, the Bar Association announced that it had been "given the responsibility of distributing all Territorial and District Court opinions" and that henceforth, bar members could subscribe to opinions of these courts for an annual fee of $25 (J.A. 49-50). No party opposed having the case decided on the papers presented, and no one suggested the need for a trial on any of these points.

The District Court entered summary judgment for petitioners on 8 December 1986 (Pet. App. 58a-67a). In upholding its rule, the court cited "special circumstances surrounding the practice of law in the Virgin Islands" which were said to distinguish this case from *Piper* (Pet. App. 64a). The opinion relied on language in the 1973 *Aronson* opinion about limited space aboard commercial flights and added, without citation, that while the number of flights had increased since then, so too had the number of tourists, thus making air travel on short notice "difficult, if not impossible" (Pet. App. 65a). Telephone service was described in a sentence as "erratic," with connections to the mainland said to be "frequently" unavailable, but no details were provided (*id.*). Also cited was a delay in publication of court opinions, statutes and rules, the District Court's heavy workload, and difficulty in assuring the ethics of non-residents (Pet. App. 65a, 67a).

Cited as "[p]erhaps the most compelling reason" for retaining the residence requirement was Rule 16, which governs appointment of counsel in criminal cases (Pet. App. 65a; 75a-78a). The opinion noted that all bar members must be available for such appointments and added (although these requirements do not appear in the text of that rule) that "none but the appointed attorney may appear on behalf of the criminal defendant," that a lawyer who "declines a criminal assignment is totally barred from the practice of law in the district court," and that the "foregoing rules are admitting of no exception" (Pet. App. 66a).

All of these justifications focused on the need for a residence requirement *after* lawyers are admitted to the Virgin Islands bar. By contrast, petitioners made no attempt to defend the requirement in Rule 56(b)(4) that lawyers must live in the Islands for one year *before* they are licensed there, even if they have already passed the bar examination. The District Court held that this restriction was valid because people move to the Islands, only to return to the mainland because of the inconveniences and high cost of island living, a tropical climate which they regard as "intolerable" and a school system "which is considered by some as a serious drawback" (Pet. App. 67a).

C. *Court of Appeals Proceedings.*

On 30 September 1987, a divided panel of the Third Circuit reversed, relying on this Court's intervening decision in *Frazier* (Pet. App. 35a-57a). The case was reargued *en banc*, and on 31 March 1988 the full court, by an 8-5 margin, agreed with the panel that the rule was invalid under *Frazier* (Pet. App. 1a-34a).

The majority opinion of the *en banc* court noted that the

Privileges and Immunities Clause applies to the Virgin Islands by the terms of the Organic Act, thus raising the question of whether this rule is valid under *Piper*, but the court elected to decide this case on non-constitutional grounds under *Frazier* (Pet. App. 5a). After reviewing the reasons cited for excluding non-residents here, the court concluded that they "are essentially the same as those rejected for lack of inherent merit in *Frazier*" and that, as in *Frazier*, alternative, less restrictive policies could be adopted to achieve the district court's goals with respect to assuring that lawyers are ethical, competent and willing to do their share in representing criminal defendants (Pet. App. 7a).

More generally, the court of appeals concluded that this Court "did not invoke its supervisory power merely to adopt an ad hoc rule for the resolution of the problem presented" in *Frazier*, as such a reading "would create the possibility of litigation with respect to every federal district having a residence requirement" (Pet. App. 7a). Instead, "*Frazier* must be viewed as generally applicable to the United States district courts," and it found no basis for distinguishing the District Court of the Virgin Islands from other district courts (Pet. App.8a).

Finally, the court of appeals added that "[e]ven against the remote possibility" that *Frazier* did not control here, there was a separate basis for overturning the Rule, namely, that court's supervisory authority over the District Court of the Virgin Islands, which had been exercised in the past "to apply to the Virgin Islands provisions of federal statues which do not apply by their own terms," such as the Jencks Act and the Speedy Trial Act (Pet. App. 9a).

The dissenting opinion sought to distinguish *Frazier* and *Piper* on the ground that the applicants there lived in a

neighboring state, whereas non-resident bar members would not be as accessible here (Pet. App. 15a-16a). It also argued that *Frazier* was decided after a trial, whereas the summary judgment affidavits in this case raised factual issues which required a trial (Pet. App. 16a-17a). It also supported the rule on the ground that the District Court of the Virgin Islands, as a territorial court, has more rulemaking autonomy than do federal district courts (Pet. App. 18a-22a).

The dissent further argued that the reasons for limiting bar membership to Virgin Islands residents were substantial enough to let the rule pass muster under the Privileges and Immunities Clause (Pet. App. 23a-32a), although it discussed only the continuing residence requirement and did not defend the pre-admission restriction other than to say that its validity "may have deserved further development at trial" (Pet. App. 24a n.11).

SUMMARY OF ARGUMENT

1. The judgment below should be affirmed because this Court has considered and rejected the arguments advanced here in *Piper* and *Frazier*, and there is no legal or factual basis for distinguishing the Virgin Islands from other jurisdictions. While the court of appeals correctly applied *Frazier* in striking down this rule in an exercise of supervisory authority, it is clear here, as it was not in *Frazier*, that this rule is subject to the Privileges and Immunities Clause. Thus, if the Court elects not to affirm the Third Circuit's exercise of supervisory authority, it should hold the rule unconstitutional under *Piper*, since Congress has specified that the Privileges and Immunities Clause shall apply to the Virgin Islands with "the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561.

Piper and *Frazier* rejected in broad terms the claim that a lawyer's residence is an adequate measure of his or her competence, ethics, or willingness to attend court hearings or to do volunteer legal work. *Piper* recognized that, as a practical matter, a lawyer was unlikely to seek admission to a bar unless he or she anticipated a regular practice there, and this consideration made it likely that non-resident lawyers, no less than residents, would invest the necessary time, money and effort to building a practice and that the concerns advanced in favor of a residence requirement were vastly overstated.

Petitioners try to distinguish these cases by noting that the non-residents there lived in an adjacent state, and they argue that such non-residents can more easily fulfil their professional obligations than would be possible here. The point is explicitly answered by *Piper*, which makes it clear that a lawyer's distance from the jurisdiction is no basis for totally excluding him or her from the bar, though it may provide a reason for requiring the affiliation of local counsel. So too here, most of petitioners' concerns can be addressed if non-residents affiliate with local counsel who will keep them abreast of any changes in local law, as well as handle court appearances and help with appointed criminal assignments if need be. In fact, that is exactly what respondents have arranged here.

Thus, since there are answers to all of petitioners' objections, and since it cannot be said that a flat ban on non-residents pursuing their profession is closely tailored to achieving the territory's objective, *Piper* and *Frazier* control here.

2. Although petitioners did not raise the point in this Court, there is no basis to remand the case for a trial on such issues as the adequacy of air and telephone service, on which the parties differed. The dispute is not over the facts, but over whether the facts justify the rule. In any event, petitioners

did not submit enough evidence to warrant holding a trial, much less to rebut respondents' factual showings on these points.

ARGUMENT

I. THE VIRGIN ISLANDS' RESIDENCE RESTRICTIONS ARE INVALID.

On three occasions in the past four years, this Court has held that lawyers may not be denied a license to practice law simply because they live in another jurisdiction. In *Piper* and in *Supreme Court of Virginia v. Friedman*, 108 S. Ct. 2260 (1988), the Court held that it was unconstitutional for a state to favor its residents over non-residents, regardless of whether they seek a license by examination or on motion. In *Frazier*, the Court exercised its supervisory authority to invalidate a rule which limited membership in a federal district court bar to lawyers who lived or had an office in the state where the district court was located.

Petitioners ask the Court to hold that the situation in the Virgin Islands is so factually and legally unique that restrictions which would be invalid elsewhere may be upheld here. Before explaining why there is no basis for making such a distinction, however, a preliminary comment is in order. The court of appeals chose to decide this case on the basis of *Frazier*, thus avoiding the need to determine whether the District Court's residence requirements violate the Privileges and Immunities Clause, which Congress in the Organic Act "extended to the Virgin Islands . . . with the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. Thus, if the Court should decide for whatever reason not to use its supervisory authority here, it must decide whether this rule is constitutional under *Piper*.

Because the analysis in *Frazier* is similar to and builds on that in *Piper*, we begin in part A by discussing the two cases together and explain why they control here as a matter of law. In part B, we answer petitioners' factual assertions and show why their concerns are overstated. In part C, we show why the 1984 amendments to the Organic Act do not prevent this Court or the Third Circuit from exercising supervisory authority to strike down this rule. Finally, in part D, we explain why Congress's decision that the Privileges and Immunities Clause should apply to the Virgin Islands as it does to the states answers petitioners' argument that conditions in the Virgin Islands are so different that these restrictions may be upheld.

A. *Piper and Frazier Are Broad in Scope and Control Here.*

The seminal case in this area is *Piper*, which struck down a residence requirement for membership in a state bar under Article IV, § 2 of the Constitution, which provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Hamilton called this Clause "the basis of the Union," The Federalist No. 80, at 537-38 (J. Cooke ed. 1961), and this Court has explained that the Clause was intended by the Framers to "help fuse into one Nation a collection of independent, sovereign States" and to "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (footnote omitted). *Accord, Friedman, supra*, 108 S. Ct. at 2264; *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975); *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 180 (1869)

The rule at issue in *Piper* was struck down under a two-part test which asks at the outset whether the activity in question is a "privilege" or "immunity" which "bear[s] on the vitality of the Nation as a single entity," *Baldwin v. Montana*

Fish & Game Comm'n, 436 U.S. 371, 388 (1978), which includes the "pursuit of a common calling." *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1985). If this requirement is met, the state law will be upheld only if "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective," and this analysis includes consideration of any "less restrictive means" that may be available. *Piper, supra*, 470 U.S. at 284. *Accord, Friedman, supra*, 108 S. Ct. at 2265-66. *See also Toomer v. Witsell, supra*, 334 U.S. at 398 (discrimination against non-residents allowed only if they are "a peculiar source of the evil at which the law is aimed").

Piper held that the opportunity to practice law is a "fundamental right" which falls within the ambit of the Clause, explaining that "the practice of law is important to the national economy" and that lawyers have a "noncommercial role and duty," such as defending unpopular causes, which makes invocation of the protections of this Clause particularly appropriate. 470 U.S. at 281. *Accord, Friedman*, 108 S. Ct. at 2264-65; *see also Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978); *Ward v. Maryland*, 12 Wall. (79 U.S.) 418 (1871). On the merits, the Court examined and found wanting the state's assertions (which petitioners echo here) that the rule was needed because non-resident lawyers are less likely than resident lawyers to: (1) remain familiar with local rules and practices; (2) behave ethically; (3) be available for court appearances, especially those called on short notice; and (4) do *pro bono* work.

The Court found no reason to assume that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the rules" or laws

in effect in the state. *Id.* at 285. Nor did the Court find any "reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner," adding that a lawyer's "professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers." *Id.* at 285-86.

The Court found "more merit" to the concern about having lawyers available to hearings, but not enough to sustain the restriction. *Id.* at 286. The Court noted that a number of non-resident applicants would likely live in a place "reasonably convenient" to New Hampshire, thus making this concern irrelevant in most instances. *Id.* at 287. The Court did not hold, however, that only these nearby non-residents could be admitted to the New Hampshire bar. Instead, it indicated that lawyers who live "a great distance" from the state could also be licensed there, although their distance would permit the imposition of a rule requiring them "to retain a local attorney who will be available for unscheduled meetings and hearings." *Id.*

Finally, this Court largely discounted the idea that bar members would be disinclined to do their share of volunteer work, finding it "reasonable to believe" that "most lawyers who become members of a state bar will endeavor to perform their share of these services," in part because that serves their own professional interest. *Id.* The Court added, though, that non-residents and residents alike "could be required to represent indigents and perhaps to participate in formal legal-aid work." *Id.* (footnote omitted).

Piper was a broadly written opinion and was interpreted as such. Those states which had similar restrictions eliminated them, and today not one of the 50 states nor the District of Columbia imposes a residence requirement on its bar

members. This includes Alaska and Hawaii, which are further from any state than the Virgin Islands. Nor are such restrictions imposed by the Supreme Court of Puerto Rico, the Superior Court of Guam, or the Commonwealth Trial Court of the Northern Mariana Islands, all of which are subject to the Privileges and Immunities Clause to the same extent as the District Court here. 48 U.S.C. §§ 737, 1421b(u), 1561, and 1681 note (Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, § 501(a)). The District Court of the Virgin Islands is thus the only court — state or territorial — which has decided that it is not bound by *Piper*.[1]

The other hurdle which petitioners must overcome is *Frazier*, in which this Court, relying on its supervisory authority over the federal courts, struck down a rule requiring members of the bar of the United States District Court for the Eastern District of Louisiana to live or have an office in

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[1]The Supreme Court of Alaska abolished residence restrictions prior to *Piper* in *Noll v. Alaska Bar Ass'n*, 659 P.2d 241 (1982), and *Sheley v. Alaska Bar Ass'n*, 620 P.2d 640 (1980), and the Supreme Court of Hawaii amended its Rule 1 to eliminate such a requirement after *Piper*. The Supreme Court of Puerto Rico amended Rule 2 of its Rules of the Board of Bar Examiners to eliminate a one-year pre-admission residence requirement, effective 16 January 1987; although reference to this restriction still appears in the governing statute, 4 L.P.R. Ann.§ 721(2) (1987 Cum. Supp.), the clerk's office confirms that the court is admitting nonresidents. The Superior Court of Guam advises that it too eliminated a residence requirement after *Piper* was issued and now licenses mainland residents. The Commonwealth Trial Court in the Northern Mariana Islands does not have a residence requirement, although we are unable to determine whether it had one prior to 1986. 1 Commonwealth of the Marianas Code Div. 3, § 3602 (1986). While Puerto Rico, Guam and the Northern Mariana Islands are subject to the Privileges and Immunities Clause, other territories, such as American Samoa, are not. *Banks v. American Samoa Government*, 4 A.S.R.2d 113, 128 n.7 (1987). Thus, without knowing whether the High Court for American Samoa imposes such a restriction, we omit that territory from discussion here.

Louisiana. 107 S. Ct. at 2611-12 & n.7. The Court followed the analysis employed in *Piper* and held that a federal court's residence requirement could not be sustained because of concerns about a lawyer's competence or availability for court hearings.

The Court explained that a lawyer's application for bar membership "is likely to be based on the expectation of considerable local practice, since it requires the personal investment of taking the state bar examination and paying fees and annual dues," and that other requirements could be imposed to assure competence and familiarity with local law. *Id.* at 2613. Nor did the fact that a lawyer had an in-state office "warrant the assumption that he or she is more competent than an out-of-state member of the state bar." *Id.* As for assuring attendance at hearings, the Court cited the availability of modern communication systems, including conference telephone arrangements, adding that sanctions could be imposed on lawyers who fail to appear at hearings and that local counsel could be required for non-local lawyers. *Id.* & n.8.

The Eastern District of Louisiana promptly amended its rule to conform with *Frazier*, although some other district courts with similar rules have not done so yet. For present purposes, however, we note that a local residence is not required in order to be admitted to the federal district courts in Hawaii, Puerto Rico, Guam or the Northern Mariana Islands, although all of these courts require non-resident counsel to have local counsel. *See* D. Hawaii R. 110-1, 110-2; D.P.R. R. 201, 203; D. Guam R 110-1; D.N.M.I. R. 110-1.

Finally, just last Term, the Court held in *Friedman* that the protections of the Privileges and Immunities Clause apply even when a state chooses to license experienced lawyers without requiring them to take an examination. 108 S. Ct. at 2264-65.

On the merits, the Court rejected the state's argument that: "Lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents." *Id.* at 2266. It held that there were less restrictive ways of achieving the state's goals, noting that the requirement that motion applicants have an in-state office "furnishes an alternative to the residency requirement that is not only less restrictive, but also is fully adequate to protect whatever interest the State might have" in assuring that motion applicants engage in a regular practice in Virginia, as the motion admission rule requires. *Id.* at 2267.

In defending the residence restrictions here, petitioners rely on exactly the same justifications which were advanced (and rejected) in *Piper*, *Frazier* and *Friedman*. Thus, petitioners argue that the restriction promotes lawyer competence, ethics and availability for court hearings and also that it assures that bar members do their share of *pro bono* criminal defense work (J.A. 38-41, 44-45; Pet. App. 64a-67a). What makes this case different, petitioners argue, is the Virgin Islands' geographic separation from the mainland and the attendant problems that causes. They argue that *Piper*, *Frazier* and *Friedman* are distinguishable because the applicants in those cases lived in a neighboring state; while non-resident lawyers could fulfill their professional obligations in that type of situation, they argue, the same cannot be said of a mainland lawyer who also seeks to practice in the Virgin Islands.

In section B, *infra*, we explain why these cases cannot be distinguished on that basis and why petitioners' argument is based on a fundamentally erroneous reading of *Piper* and its progeny. We also demonstrate why, as *Piper* held, there are less restrictive alternatives which will address each concern and why, as a practical matter, they are overstated. Before doing so, however, two preliminary comments are in order.

First, none of the arguments raised by petitioners explains the need for Rule 56(b)(4), which requires lawyers to live in the Virgin Islands for a year before gaining their license (Pet. App.78a). Petitioners did not defend this rule below, and even the dissenting judges had "serious reservations" about its validity (Pet. App. 24a n.11). Indeed, as we discuss below (at 33-34), this artificial constraint on the number of on-island lawyers actually retards the District Court's goal of providing legal assistance to indigent criminal defendants. Thus, whatever the Court may decide with respect to the post-admission restriction in Rule 56(b)(5), it should affirm the court of appeals' judgment that the pre-admission restriction in Rule 56(b)(4) is invalid.

Second, in Part I of this Argument, we accept for argument's sake petitioners' characterizations that the air, telephone and other services are less than ideal, but we explain why problems of that sort cannot sustain the rule. As our Statement of the Case indicated, respondents do not concede the accuracy of these characterizations, and Part II of this Argument will explain why, even if the Court is willing to consider these types of arguments as a basis for upholding the rule, petitioners' factual showing on each point was so vague and conclusory as to preclude entry of summary judgment in their favor or even a remand for trial.

B. *Petitioners' Distinctions Are Legally Invalid.*

Petitioners' entire legal argument hinges on a sentence in *Piper* which indicates that as a practical matter, most out-of-state applicants will live at a place "reasonably convenient" to the licensing state. 470 U.S. at 287, *quoted in Frazier, supra*, 107 S. Ct. at 2613. This observation merely states the obvious, however, and there are several reasons why it cannot properly be viewed as a limit on the holding of *Piper*.

First, petitioners' argument ignores language in *Piper* which makes it clear that some individuals who will seek membership in a state bar will reside "a great distance" from the state. 470 U.S. at 287. The Court did not even suggest that such applicants could be excluded from a state bar on this basis, although it did recognize that their distance from the state would permit the adoption of a rule requiring them to obtain local counsel who would handle unscheduled meetings and hearings. *Id.*

Second, the concern was clearly raised in *Piper* that invalidating the rule would open the door not only to Vermont lawyers, but also to lawyers from New York, Los Angeles and other distant cities who would not be as committed to New Hampshire as local residents or even residents of neighboring states. The court of appeals was evenly divided with respect to the validity of the rule in *Piper*, and the judges who voted to uphold the restriction stated that New Hampshire was justified in excluding non-residents in order to prevent "large law firms in distant states" from simply "qualify[ing] one or two of their number for New Hampshire practice [and] dispatching them from their homes in upper Manhattan or Santa Monica as necessary to handle New Hampshire litigation," adding that the New Hampshire bar "could come to be dominated by out-of-state lawyers whose only connection with the state would be their desire to earn money there." 723 F.2d 110, 119 (1st Cir. 1983). That argument failed to persuade this Court in *Piper*, 470 U.S. at 278, and similar claims cannot be credited here.

Finally, we note that Justice White's concurring opinion in *Piper* expressed a preference for invalidating the rule on the facts of that case, which involved a Vermont lawyer who lived 400 yards from the New Hampshire border, rather than by invalidating the rule on its face. *Id.* at 288-89. The other

seven Justices in the majority declined to decide the case on this basis, however, and the Court's later rulings in *Frazier* and *Friedman*, which extended the reach of *Piper*, suggest that the principles announced in these three cases are to be broadly applied. Thus, it is legally irrelevant in this case that the Virgin Islands are islands and are not directly adjacent to another land mass.[2]

Moreover, petitioners' argument misses a larger theme which permeates *Piper* and *Frazier*, namely, that a lawyer is unlikely to seek admission to a bar unless he or she anticipates enough of a practice there to justify the requisite investment of time, money and effort. *See* 470 U.S. at 285; 107 S. Ct. at 2613. This is true with respect to the Virgin Islands no less than any other jurisdiction. There are practical considerations which any mainland lawyer must consider in deciding to seek admission in the Virgin Islands bar, and they will likely deter all but those who intend to devote a regular portion of their practice to the Virgin Islands.

First, applicants must pay a $200 fee and take a bar examination, which is administered only once a year in July. There is no way to be admitted to the Virgin Islands bar on motion, and if anything, taking a bar examination in the Islands may be riskier than in other jurisdictions, since there is no formal review course. Thus, even if there were no residence requirement, it is likely that applicants would have to invest in a trip to the Islands to review local law and consult with local lawyers.

Once admitted to the bar, there are ongoing obligations which must be met. Lawyers must pay annual dues of $100

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[2]We note, however, that these restrictions apply with equal force to residents of Puerto Rico, which is 40 miles from the Virgin Islands at its closest point and which has frequent air service linking it to the Virgin Islands (J.A. 33).

to the Bar Association and a $500 annual license fee. 27 V.I. Code Ann.§ 302(a). Non-residents must also consider the logistics of practicing on the mainland and in the Islands, including the obligation to handle their share of *pro bono* criminal assignments. And if they are derelict in handling their professional obligations, they can be suspended or disbarred, which may affect their eligibility to practice law in a mainland jurisdiction.

These practical considerations will not deter individuals such as respondents, but they are likely to deter applicants who simply want to hang another sheepskin on their office wall. What they also suggest is that lawyers are unlikely to seek admission to the Virgin Islands bar unless they intend to enter a partnership or otherwise affiliate with a resident lawyer who will agree to handle matters that arise while the non-resident lawyer is on the mainland.

This is precisely what respondents have done here. Although they are based in New York, they have a resident partner and associates in the Islands, and their colleagues are jointly responsible for each pending case and can be readily contacted by a local judge if necessary. If local counsel is available and able to handle such a hearing, it makes no difference whether his or her non-resident partner is absent. And even if non-residents are unwilling to affiliate with local counsel, *Piper* indicates that they may be required to do so because of their "great distance" from the Islands. 470 U.S. at 287.

The availability of local counsel to handle emergency hearings answers concerns about the alleged inadequacy of air service or telephone service linking the Islands to the mainland. Thus, the imposition of such a requirement is a far less restric-

tive means of achieving the District Court's goals than a flat exclusion of non-residents from the bar.[3]

Several district courts which are further removed from the mainland than the Virgin Islands — those in Hawaii, Guam and the Northern Mariana Islands — license lawyers without regard to residence, but expect that non-resident counsel have local counsel who will take a full and active role in litigation if the need arises. For example, Rule 110-1(e) of the District Court of Guam requires non-resident bar members to:

> designate an attorney who is an active member in good standing of the Bar of this Court as co-counsel. He shall file with such designation the address, telephone number and written consent of such designee. The associated local attorney shall at all times meaningfully participate in the preparation and trial of the case with the authority and responsibility to act as attorney of record for all purposes. Any document required or authorized to be served on counsel by the Federal Rules of Civil or Criminal Procedure, the Bankruptcy Rules, or by these Rules, shall be served upon the associated local counsel. Service upon associated local counsel shall be deemed proper and effective service unless ex-

[3]Petitioners' summary judgment affidavits devoted a sentence to the issue of mail service (J.A. 38), but their brief now cites (at 11 n.5) some recent press releases from Delegate Ron De Lugo to the effect that first-class mail service from the mainland to the Islands is not at mainland levels. One release adds, however, that the "record for delivery of mail from one island to the other, or even on the same island, is not much better," which hardly argues for a rule limiting practice to residents only. The case dealing with mail service which *amicus curiae* reprints as an appendix to its brief has been withheld from publication by the Third Circuit and is thus not authoritative precedent under that court's Internal Operating Procedures (Ch. V.F.1), but in any event it does not suggest that the Third Circuit regards mail service to the Islands to be uniquely poor.

> cused by the judge. Local counsel shall attend all proceedings related to the case before this Court for which counsel is associated (unless excused by the Court).[4]

Petitioners argue that local counsel is not a solution, citing problems experienced with *pro hac vice* practitioners in other cases (J.A. 40), but as this Court made clear in *Frazier*, that experience is not probative of what the experience would be if lawyers were seeking admission to the bar with the expectation of a regular practice in the jurisdiction, and that is precisely what respondents intend here. 107 S. Ct. at 2612.

These observations about local counsel also answer petitioners' point about the lag in publishing court opinions, sessions laws or agency rules. In the first place, bar members can now subscribe to District Court and Territorial Court slip opinions for an annual fee (J.A. 49-50). To the extent that there is a delay in publishing sessions laws or rules, we note that the Virgin Islands are not unique in this regard, and in any case, local counsel can be asked to check on any recent developments.[5] Indeed, a lawyer who is going to render an

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[4]The texts of the local counsel rules in Guam, Hawaii and the Northern Marianas are almost identical (D. Hawaii R. 110-1; D.N.M.I. R. 110-1(f)). We note that the cited rules in all three district courts treat non-resident lawyers as being "inactive" bar members who cannot appear in a case unless they are affiliated with local counsel. This classification has little practical consequence in these or other district courts, since the only reason why lawyers seek a license there is to litigate cases. It would be inappropriate here, however, since the District Court of the Virgin Islands licenses lawyers not only to litigate federal cases, but to write wills, handle house closings, draft opinion letters and handle a variety of other matters that lawyers do every day of the week as "active" members of a bar.

[5]Petitioners' concern about the availability of statutes may in fact be overstated. For example, the pocket parts to the Virgin Islands Code Annotated which are designated for use in 1988 arrived in this Court's library on 23 March 1988.

opinion letter on Virgin Islands law is likely to do this in any event, regardless of his or her residence.

If anything, the Islands' isolation from the mainland should increase the sensitivity of non-resident bar members to issues such as the availability of air and telephone service, and they will likely take those factors into account in setting up their practice, as respondents have done here. As a practical matter, a client has many good reasons to retain a local attorney, particularly if the client or the client's headquarters is far removed from the jurisdiction. If a client nonetheless chooses to rely on a non-resident lawyer, the client doubtless has good reasons for doing so, such as the lawyer's familiarity with the client's business, the lawyer's skill in a particular specialty, or some other reason which has caused the client to place special trust in and reliance on the non-resident lawyer, who likely handles other matters for the client as well. *See Frazier, supra*, 107 S. Ct. at 2614 n.12. Thus, if a non-resident lawyer has a case dismissed because he or she fails to appear, or if the lawyer erroneously advises a regular client because he or failed to check the latest sessions laws, that lawyer has much more to lose than a local lawyer who is retained to perform the same task on a one-time basis.

Moreover, to the extent that petitioners complain about the inadequacy of current services, they fail to consider the fact that the elimination of trade barriers may help to ameliorate those problems. Generally speaking, the cure to problems of insularity is not continued isolation, but openness. Thus, if the number of bar members increases, a legal publisher or database company may have an incentive to report Virgin Islands opinions and laws on a more rapid basis. There are also things that the Government of the Virgin Islands can do other than file a brief complaining about how bad current conditions are. If the publication of court opinions and session laws is unduly

delayed, the Government can award the contract to another publisher, just as its Public Service Commission can switch telephone carriers if the current one is not doing a good job. And one should not lose sight of the fact that a less restrictive admissions policy will benefit clients by offering an expanded range of legal services.

This sort of analysis also answers petitioners' remaining concerns. With respect to assuring non-resident lawyers' ethics, the reasons stated above, as well as those expressed in *Piper*, suggest that non-residents have as much incentive as local lawyers to maintain a good reputation in the community. And if problems should develop after a lawyer is admitted to the Virgin Islands bar, the fact that he or she is a Virgin Islands bar member gives the authorities more leverage than if the lawyer appears *pro hac vice* in a case and is never heard from again. As for the concern about checking on the character of non-resident applicants, petitioners presently rely on a mainland entity, the National Conference of Bar Examiners, to compile character information. If the concern is that the Committee of Bar Examiners will have to read more applications, that is no basis for denying applicants a license, and admitting more lawyers will increase the pool of potential Committee members, such as respondent De Vos, who has volunteered to serve (J.A. 35).

Finally, it is argued that non-residents must be excluded from the Virgin Islands bar because they could not handle *pro bono* representation of indigent criminal defendants. It is important to note what is *not* at issue here, and that is the authority of the District Court to call upon members of the bar to supplement the work of the Federal Public Defender, which handles most of the appointed criminal cases in that court. Indeed, *Piper* made it clear that a court may ask non-residents, no less than resident bar members, to undertake mandatory *pro bono* assignments. 470 U.S. at 287.

What *is* at issue is the District Court's preference (which is nowhere embodied in the text of the applicable rule, *see* Pet. App. 75a-78a) that only the lawyer who is assigned to a given case can appear on behalf of a defendant at each and every hearing, no matter what the subject is and no matter who the substitute attorney may be. The record does not show any basis for barring an appointed lawyer from asking a colleague to handle a particular hearing or matter in the lawyer's absence. Indeed, if this gloss on the rule were enforced as rigidly as petitioners suggest (but never directly state), the effects would be counter-productive, if not harmful to the efficient operations of the District Court.

There are currently times when a Virgin Islands lawyer is busy elsewhere, say, trying a case in the Territorial Court or attending depositions on the mainland, and simply cannot attend an emergency bond revocation hearing or similar proceeding. Surely, the interests of justice are better served in that situation if that lawyer can send a colleague to District Court and get the matter disposed of, rather than ask for a continuance. Similarly, if this gloss on the rule were literally interpreted, a trusts and estates specialist could not ask a partner with 25 years of criminal trial experience to take the principal role in a first degree murder case, a result that would raise serious questions regarding the effective assistance of counsel.[6]

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[6]Petitioners' counsel acknowledged during the *en banc* reargument that this rule is not applied as rigidly as their papers suggest. Judge Cowen asked how it "could possibly be to the reasonable interest of [a] criminal defendant if he gets assigned someone who's not a court litigator," to which counsel answered that a lawyer who believes he or she is not qualified to handle the case can "make application to the court to determine whether a substitution can be made" under Rule 16(B)(i) (Pet. App. 76a). Transcript of oral argument at 36-37 (29 December 1988). Rule 16(B)(j) also states that the court "may, in the interests of justice, substitute one or more appointed counsel for another at any stage of the proceedings before it" (Pet. App. 76a).

To substantiate this argument, petitioners state that lawyers are generally asked to handle three or four criminal cases each year, implying that these are all District Court cases where the "no substitution" practice applies (J.A. 40-41, 44-45). In fact, this estimate seems to include cases assigned by the Territorial Court, which has a larger criminal docket and in which appointed counsel can ask a colleague to help out. Indeed, the statistics filed by the District Court and the Federal Public Defender with the Administrative Office of the United States Courts suggest that bar members may go for more than a year between District Court criminal assignments, even assuming that the assignments are parcelled out evenly among all bar members.

Thus, the preliminary *Annual Report of the Director of the Administrative Office of the United States Courts* shows (at 92, 88, 109) that for the fiscal year ending 30 June 1988, 396 defendants were charged in 324 criminal cases filed in the District Court of the Virgin Islands; 326 of these defendants were represented by the Federal Public Defender, leaving 72 defendants to be represented by the private bar. According to the 1988 *Martindale-Hubbell Law Directory* (Vol. VII, pp. 55-58) there are approximately 165 lawyers in Virgin Islands, apart from those in government or judicial service. Thus, even if all 72 defendants required appointed counsel, there are more than enough bar members to represent them in a given year.[7]

[7]The figures are comparable for the two preceding years. For the year ending 30 June 1987, 321 criminal cases were filed involving 392 defendants, 354 of whom were represented by the Federal Public Defender, leaving 38 defendants to be served by the private bar. *Annual Report of the Director of the Administrative Office of the United States Courts (1987)* at 238, 246, 288. For the year ending 30 June 1986, which largely coincides with the period that this case was being litigated in District Court, 264 criminal cases were filed involving 331 defendants, of whom 271 were represented by the Federal Public Defender, leaving 60 defendants to be served by the private bar. *Annual Report of the Director of the Ad-*

We do not doubt that some lawyers may be asked to handle three or four criminal cases a year in District Court, either because they seek these assignments or because the judges trust their trial skills, but that is a matter of choice. Thus, a bar member's mandatory *pro bono* duties are not as extensive as petitioners suggest, and in any event, the District Court's preference that only appointed counsel appear in a given case is plainly excessive as a means of assuring that criminal defendants receive adequate legal representation.

More importantly, there are far less restrictive means of achieving that objective besides refusing to license non-resident lawyers. The simplest solution is allowing bar members, regardless of where they live, to send a colleague to court if they are unavailable. The principal objection to this proposal is that it would increase the workload on Virgin Islands lawyers (Pet. App. 34a), but the claim does not withstand scrutiny, because allowing non-residents to join the bar would increase the pool of available lawyers, thus reducing the overall burden on local lawyers.

Moreover, if handling criminal cases is part of the price of admission to the Virgin Islands bar, a non-resident lawyer knows that he or she must find a resident lawyer to handle matters that arise when the non-resident is on the mainland. As a practical matter, Virgin Islands lawyers will not enter into partnership arrangements or even serve as local counsel for mainland lawyers if they think that too much of their time will be taken up handling criminal cases for a mainland colleague. But if resident lawyers *are* willing to enter into such

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ministrative Office of the United States Courts (1986) at 232, 250, 357.

Figures provided by the clerk's office in the Territorial Court confirm that the criminal caseload there is more substantial, with 784 cases filed in calendar year 1986 and 1024 cases in calendar year 1987. Although figures are not readily available, a substantial number of those cases are handled by the separate Office of the Public Defender. 5 V.I. Code Ann.§ 3521.

arrangements and to appear on behalf of a client when the non-resident lawyer is unavailable, there is no reason why they should be prevented from doing so, nor can the District Court's refusal to let them do so be used as a reason for refusing to increase the pool of lawyers available to serve criminal defendants.

Other measures could be undertaken to provide criminal defendants with adequate representation, such as establishing a pool of attorneys who are willing to handle these cases, establishing an "interest on trust accounts" program, under which the interest on lawyers' trust accounts could be used to compensate criminal defense attorneys handling these cases, or imposing a licensing fee on lawyers who do not wish to serve as defense counsel (both resident and non-resident alike) which would be used to compensate attorneys handling these cases.

Finally (and paradoxically), there is one aspect of Rule 56 that artificially limits the number of lawyers who could handle criminal cases — the requirement that applicants must live in the Islands for one year before their admission, even if they have taken and passed the Virgin Islands bar examination. This restriction, which applies not only to recent graduates, but also to experienced practitioners who have decided to relocate to the Islands, makes no sense with respect to either set of applicants, and it actually reduces the availability of counsel for criminal cases. Indeed, many new lawyers seek to build a reputation and a practice by taking criminal cases, and some of the experienced lawyers may have done criminal work in their previous practice.

Petitioners have never made a specific defense of this restriction, which is obviously protectionist. The dissenting judges in the court of appeals did not defend it either, and the reasons cited by the district court dealt with perceived hardships of island life, which have nothing to do with a lawyer's

fitness to try cases (*see* Pet. App. 24a n.11, 67a). The existence of this restriction at least suggests that the remainder of Rule 56 may have similar, less lofty purposes than the ones petitioners state here. *See Piper, supra*, 470 U.S. at 285 n.18.[8] In any event, it is difficult to see how petitioners can complain about the need to get private bar members to handle criminal cases, when this rule artificially limits the supply of Virgin Islands residents who could handle these appointments.

A final observation may help place the argument in perspective. Most of petitioners' objections focus on litigation concerns, but they fail to acknowledge that the restrictions in Rule 56 affect not just litigators, but the much larger group of lawyers who never (or only rarely) see the inside of a courtroom. The District Court is the only court that licenses lawyers in the Virgin Islands. Thus, the rule operates not merely to preserve federal litigation for local lawyers, as was the case in *Frazier*, but to bar non-residents from gaining a license to pursue their profession in the Islands. Regardless of whether the Court decides this case on non-constitutional grounds under *Frazier* or on constitutional grounds under *Piper*, the sweep of this rule is all-encompassing and is certainly not "closely tailored" to address the specific problems which are said to be posed by non-resident lawyers. *Hicklin v. Orbeck, supra*, 437 U.S. at 528.

This discussion demonstrates why the court of appeals was correct in following *Frazier* and why, since Congress has ex-

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[8]The integration rule governing the Virgin Islands Bar Association waives this one-year rule for employees of the United States Government, the Government of the Virgin Islands or legal services groups. 5 V.I. Code Ann., App. V, R. 51(a), (b). Thus,the only lawyers directly affected by this restriction are those contemplating a private law practice in the Virgin Islands.

pressly applied the Privileges and Immunities Clause to the Virgin Islands, the rule is unconstitutional under *Piper* as well. Apart from *Frazier*, there is a separate non-constitutional basis for affirming the judgment below, namely, the Third Circuit's own supervisory authority over the District Court of the Virgin Islands. *See LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). Petitioners' brief does not address this point, but, as the court of appeals pointed out (Pet. App. 9a), that power has been exercised in the past to extend to the Virgin Islands various protections which are available in mainland courts, but which Congress has not explicitly extended to the Islands, including the Speedy Trial Act, the Bail Reform Act, and the Jencks Act. *Government of the Virgin Islands v. Bryan*, 818 F.2d 1069, 1074 (3d Cir. 1987); *Government of the Virgin Islands v. Ortiz*, 427 F.2d 1043, 1047-48 (3d Cir. 1970); *Government of the Virgin Islands v. Lovell*, 378 F.2d 799, 805 (3d Cir. 1967).

Since the Third Circuit may use this power to give individuals rights which Congress had not specifically extended to the Virgin Islands, that court was surely on solid ground here, since Congress has extended the protections of the Privileges and Immunities Clause to the Islands and since the judgment below is fully consistent with *Piper*, *Frazier* and *Friedman*. Moreover, the Third Circuit is familiar with conditions in the Islands because its judges sit there twice a year, and thus its determination that the situation does not warrant an exception to the principles announced in *Frazier* or *Piper* merits respect.

For all these reasons, there is no basis for distinguishing *Piper*, *Frazier* and *Friedman* or for accepting arguments that were rejected in those cases to uphold the restrictions at issue here.

C. *The 1984 Amendments to the Organic Act Do Not Prevent This Court or the Court of Appeals from Invalidating the Rule.*

Apart from trying to to distinguish *Frazier* on the facts, petitioners' only legal challenge on the issue of supervisory authority is the claim that Congress prohibited the exercise of that power with respect to the Virgin Islands when it amended the Organic Act in 1984. Pub. L. No. 98-454, Title VII, 98 Stat. 1737-41, codified at 48 U.S.C. §§ 1611-1614 (Supp. III 1985). According to petitioners' brief (at 24), those amendments "clearly constitute[] a congressional determination to permit locally determined rules suited to the territory's special needs," and thus "to hold that the Virgin Islands must be swept into a uniform national rule of admission to practice is to disregard the congressional allocation of authority."

The problem with this argument is that it is premised on a less than complete description of the 1984 amendments. Petitioners correctly note that before these amendments were enacted, the Organic Act vested the judicial power of the Virgin Islands in the District Court, which was given the power to prescribe rules of practice and procedure for itself and any territorial court established by the Virgin Islands legislature. 48 U.S.C. § 1611(b)(1982). The 1984 amendments continued that power in the District Court and also vested it "in such appellate court and lower local courts as may have been or may hereafter be established by local law." 48 U.S.C. § 1611(a)(Supp. III 1985). They further provided that rules "governing the practice and procedure of the courts established by local law . . . shall be governed by local law or the rules promulgated by those courts." 48 U.S.C. §§ 1611(c)(Supp. III 1985).

What does all this mean in practice? Both before and after passage of the 1984 amendments, the only local court created by the Virgin Islands legislature was the Territorial Court, a trial court which shares jurisdiction with the District Court over certain civil and criminal matters, and from which appeals go to a three-judge appellate division of the District Court. 48 U.S.C. §§ 1612, 1613a (1982 & Supp. III 1985); *see also* p. 2, *supra*. The Territorial Court does not license lawyers separately from the District Court, and thus only District Court bar members are authorized to practice in the Territorial Court.

What the 1984 amendments did — and for whatever reason, petitioners fail to discuss the relevant provisions — was to give the Virgin Islands legislature the discretion to establish an appellate court to hear appeals from the Territorial Court, and when that court was established, the District Court's appellate function would end. 48 U.S.C. § 1613a(d) (Supp. III 1985). Under these amendments, this new appellate court would be the highest court in the Virgin Islands, and for the first 15 years after its creation, a party which lost there could seek review in the Third Circuit by writ of certiorari. In addition, the Judicial Council of that Circuit was directed to advise appropriate congressional committees about whether, at the end of this 15 year period, this new appellate court "had developed sufficient institutional traditions to justify direct review" by this Court. 48 U.S.C. § 1613 (Supp. III 1985).

The changes to other portions of the Organic Act (which petitioners do cite) are essentially editorial in nature. *Compare* 48 U.S.C. §§ 1611-14 (1982) with §§ 1611-14 (Supp. III 1985). They are intended to take account of any new, unified territorial court structure if and when the legislature should create it. Since the legislature has not acted, however, the

1984 amendments are not remotely relevant to this case.[9]

But even if all this is wrong, and even if *Frazier* cannot be invoked to strike down the restrictions in Rule 56, petitioners' argument is still beside the point as it is clear that the District Court and all territorial courts are still subject to the Privileges and Immunities Clause, which "shall have the same force and effect [in the Islands] as in the United States or in any State of the United States." 48 U.S.C. § 1561. Thus, even if Congress in 1984 freed the District Court from the supervisory authority of this Court and the Third Circuit, petitioners must still explain how this rule can be squared with *Piper*, which they cannot do.

D. *The Virgin Islands' Status as an Unincorporated Territory Provides No Basis for Upholding This Rule.*

Petitioners' final argument is that the Virgin Islands, like other unincorporated territories, have certain linguistic, historical and cultural attributes which make them so fundamentally different from the states that federal courts should defer to a local court's judgment about what restrictions must be imposed on members of its bar. The argument must fail because petitioners' analogies to other territories do not hold water, and, more fundamentally, Congress decided this issue when it applied the Privileges and Immunities Clause to the Islands.

The comparison with Puerto Rico is inapt. Puerto Rico has an Article III federal district court with exclusively federal jurisdiction. 28 U.S.C. § 119, 132(a). There is also a separate court system, headed by the Supreme Court of Puerto Rico,

[9]Indeed, if the legislature did establish such an appellate court, it would eliminate the District Court's appellate docket and reduce the heavy caseload which was cited as a reason for excluding non-resident bar members (Pet. App. 65a).

which operates in the same manner as a state court system, and when these courts interpret Puerto Rico law, their decisions are regarded as controlling in this Court and in any federal court which may confront a question of Puerto Rico law (for example, in a diversity case).[10]

The Virgin Islands are in a totally different posture because they do not have a separate territorial court system, and the District Court of the Virgin Islands is not the final authority on territorial law in the same way that the Supreme Court of Puerto Rico is. The Third Circuit hears direct appeals involving questions of territorial law, and it has explicitly declined to show any special deference to the District Court's construction of territorial law, but reviews the underlying legal issue on a *de novo* basis. *Saludes v. Ramos*, 774 F.2d 992, 994 (3d Cir. 1984) (while the "district court's reading of local law should be respected . . . we will not accord it any greater deference than we would in a diversity action" and will exercise "plenary review" of territorial law issues presented on appeal).[11]

Thus, the cases petitioners cite regarding deference to courts on questions of state or territorial law have nothing to

[10]Puerto Rico also has considerably more control over its affairs than Congress has ceded to the Virgin Islands. When the United States and Puerto Rico agreed to the latter's commonwealth status, Puerto Rico was given the freedom to draft its own constitution, so long as it provided for a republican form of government and a bill of rights. *See* 48 U.S.C. § 731c. *See generally Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 586, 592-94 (1976).

[11]Petitioners cite some Ninth Circuit cases reflecting that court's former policy of deferring to the District Court of Guam in the latter's interpretation of Guam territorial law. What they fail to note that the Ninth Circuit recently abandoned that policy in a unanimous *en banc* decision which cited, among other reasons, a desire to harmonize its standard of review with the *de novo* standard used by the Third Circuit in reviewing Virgin Islands cases. *Guam v. Yang*, 850 F.2d 507, 510 (9th Cir. 1988).

do with the question of whether the restrictions in Rule 56 are constitutional, and similar restrictions have been declared invalid under the Equal Protection Clause and the Privileges and Immunities Clause in cases arising from Puerto Rico. *Flores de Otero, supra*; *Garcia v. Silver*, 760 F.2d 33 (1st Cir.1985). If anything, petitioners' comparisons with other territories bolster respondents' argument that the rule here should be struck down, inasmuch as the Supreme Court of Puerto Rico, the Superior Court of Guam and the Commonwealth Trial Court of the Northern Mariana Islands do not impose such restrictions on their bar members. *See* note 1, *supra*. Nor do the District Court of Guam nor the District Court for the Northern Mariana Islands, which have a legal structure and hybrid jurisdiction very similar to that of the District Court of the Virgin Islands. 48 U.S.C. §§ 1424-1424-b, 1611-1614, 1694-1694c. *See* pp. 23-24, *supra*.

Nor do the perceived language barriers (which are raised as a justification for the first time in petitioners' opening brief) make as much difference as petitioners suggest. Proceedings in Puerto Rico courts are conducted in Spanish, but that would plainly be no reason for limiting bar membership to Puerto Rico residents, and in any event, proceedings in the federal district court in Puerto Rico are conducted in English, 48 U.S.C. § 864, as are proceedings in the District Court of the Virgin Islands.[12]

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[12]Petitioners note (at 29 n.16) that there is an indigenous Dutch Creole patois in the Virgin Islands without mentioning that the last persón who spoke Dutch Creole fluently died in 1987, and the only way one can learn the language now is by attending a course at the local college. *Virgin Island Daily News* at 3 (1 October 1987).

Petitioners' brief also suggests (at 20 n.13) that this perceived language barrier can prevent a party from receiving a fair trial, relying on an unpublished Third Circuit opinion. *Government of the Virgin Islands v. Blyden*, No. 86-3346 (5 January 1988). Passing the fact that this claim was not

In the final analysis, though, petitioners' arguments are irrelevant because of a more fundamental problem, and that is the fact that Congress has decided the issue. Congress has exercised its plenary power over this territory and has stated without ambiguity that the Privileges and Immunities Clause shall be "extended to the Virgin Islands . . . with the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. This judgment is conclusive and answers any and all distinctions raised by petitioners based on the Virgin Islands' status as an unincorporated territory.

Unlike the so-called "incorporated" territories, unincorporated territories do not have an anticipation of statehood, and only "fundamental" constitutional rights apply there. *Flores de Otero*, 426 U.S. at 599 n.30, and *see* cases collected there. Congress may, however, extend additional constitutional provisions to unincorporated territories, and "a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight." *Torres v. Puerto Rico*, 442 U.S. 452, 469-70 (1979).

This is particularly true with respect to the Privileges and Immunities Clause. There are many good reasons for Congress to let an unincorporated territory favor its residents over non-residents in ways that would be unconstitutional if attemp-

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made below and that the decision has no precedential value under the Third Circuit's Internal Operating Procedures, *see* note 3, *supra*, petitioners misstate what happened there. A *pro se* habeas corpus litigant raised 14 objections to his conviction, one of which was that his appointed lawyer "did not understand over 30% of testimony of government witnesses." Slip op. at 13. The district judge dismissed the suit, finding that "the vast majority" of these claims lacked merit, and the court of appeals remanded, not because it found merit to this claim, but because it could not review the judgment based on that conclusory statement. *Id.* at 14-15.

ted by a state. For example, it may wish to encourage people to relocate there or to favor those people whose efforts will be required for the territory's future development. Thus, if a territory's organic act fails to mention the Privileges and Immunities Clause, the territory is free to favor residents in this manner. *See Mullaney v. Anderson*, 342 U.S. 415 (1952). When Congress does choose to apply a constitutional provision to a particular territory, that decision "is entitled to great weight," *Torres*, 442 U.S. at 770, and that is particularly appropriate here, since Congress did not extend the Privileges and Immunities Clause to the Virgin Islands in the 1936 or 1954 versions of the Organic Act, and it was not until 1968 that this provision was included in the Bill of Rights section of that law. Pub. L. No. 90-496, § 11, 82 Stat. 841, amending 48 U.S.C. § 1561.

Because Congress has spoken with such clarity on this issue, as it has plenary authority to do under Article IV, § 3, the Court should be wary of requests to second-guess that judgment and to carve out exceptions to generally applicable standards, and the need for caution is particularly great when the effect of granting such a request would be to dilute constitutionally protected rights. If any deference is owed here, it is to the judgment made by Congress, and if conditions in the Virgin Islands are really as bad as petitioners allege, their remedy is to persuade Congress that it made the wrong decision in 1968 and that the Virgin Islands are not yet ready to be held to the same standards that are applied to the states — or to Puerto Rico, Guam, or the Northern Mariana Islands, for that matter.

II. THERE IS NO BASIS TO REMAND THIS CASE FOR A TRIAL.

This case proceeded below on the basis of cross-motions for summary judgment. Despite the parties' differing views

on such things as the quality of air and telephone service, no one sought a trial on these issues, apart from a passing reference to that effect by petitioners' counsel at the *en banc* reargument. Transcript of oral argument at 32 (29 December 1988). Although the dissenting judges below suggested that a trial was needed to sort out these disputes (Pet. App. 16a-17a), petitioners did not raise this issue in their certiorari petitions or their brief to this Court, nor did the Government of the Virgin Islands in its brief as *amicus curiae*. Thus, it does not appear that the issue is before the Court, but since respondents will not have an opportunity to answer such a claim if it is made in petitioners' reply brief, we make the following points.

Any dispute here is not over the facts, but the conclusions that one draws from them, given the legal issues in this case. One can probably prove at trial such facts as how many airline seats are available each day from the mainland to St. Thomas or St. Croix and how many seats are empty during peak times of the year. One could also show, for example, that even if the daily non-stop from Philadelphia to St. Thomas is often sold out, there are alternative one-stop flights through Miami or San Juan.

But what is a judge supposed to do with those facts? Does the example just cited warrant a conclusion that service from Philadelphia to the Islands is adequate because there are many one-stop options or inadequate because the daily non-stop is often full? On what basis is a trial judge to measure the adequacy of that service, and what is the point below which the judge is supposed to declare whether the service is so inadequate that a ban on non-resident bar members is justified?

The same can be said of telephone or mail service. How does one define what level of service is adequate? More im-

portantly, how is any of this evidence probative of how good service would be if restrictions on mainland lawyers were removed and there was a demand for better service? Any trial would be inevitably retrospective, looking at the way things are now, and it would not address the ways things would be in the future.

Thus, it is not certain what a trial would accomplish in terms of developing a factual record that would allow the trial court or an appellate court to rule with any greater certainty on the legal issues presented on this record. Moreover, we note that there was a trial in *Frazier*, in which findings of fact were made after there was oral testimony about the need for a similar rule, but this Court found that evidence to be less than probative because it involved prior experiences with *pro hac vice* practitioners and not bar members who anticipated a regular practice in the district court. 107 S. Ct. at 2612. The district court in both *Piper* and *Friedman* had no difficulty in deciding the legal questions based on summary judgment affidavits, and this case can be decided on that basis too.

In making this point, however, it is important not to overlook the minimal nature of the evidence which petitioners placed in the record. On the issue of air service, petitioner Barnard merely noted that the Islands are two and one-half hours from the nearest point on the mainland, adding that:

> At many times of the year, particularly during what is locally referred to as 'the tourist season' between December and April, reservations may be totally unavailable for commercial flights from the Continental United States for protracted periods of time. Travel to the Virgin Islands by sea can be accomplished, for practical purposes, only by cruise ship which takes at a minimum several days of sea travel from the closest mainland point.

(J.A. 37). That is the *only* evidence in the record to support petitioners' assertions with respect to air service.

Barnard's description of communications is equally skimpy. While he states that the service to the mainland has "substantially improved in recent years," he adds that it:

> . . . remains significantly less reliable than that normally expected within the Continental United States. It is often difficult to secure a long distance connection to a distant point, or to maintain a fully audible conversation without interference from static, voice fade outs, transmission gaps, or disconnections. Mail delivery is often unreliable and almost always involves material delays.

(J.A. 38). The only other evidence on telecommunications came from the president of the Bar Association, who stated that:

> [W]hile telecommunications between the Virgin Islands and the continental United States have improved substantially in the last decade, they remain erratic and conversations are frequently impaired by static, echoes, transmission gaps and disconnections.

(J.A. 44).

The foregoing is not a summary of petitioners' evidence. It is a verbatim recitation of *all* the evidence they placed in the record on these points, and the rest of their affidavits simply set forth their other concerns. These are the "facts" which they claim entitle them to summary judgment, yet this Court's cases make it clear that such a showing is not adequate to merit entry of summary judgment in one's favor, nor is it sufficient to defeat an opponent's summary judgment motion and force an issue to trial. *See generally Anderson v. Liberty Lob-*

by, Inc., 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The point is demonstrated here by comparing these vague generalizations with the evidence that respondents placed in the record specifically describing the amount and types of air service, including an indication that some of the best-served commuter routes in this country are those between the Virgin Islands and the airline "hub" at nearby San Juan, Puerto Rico (J.A. 33). Similarly, respondent De Vos described in some detail the telecommunications systems which he regularly uses between his office in New York and that of his colleagues in the Islands, including the availability of WATS lines and telefax machines (J.A. 33-34). Indeed, the index to petitioners' brief demonstrates that Virgin Islands lawyers have access to Lexis, which can be reached only by telephone lines to the mainland.

Finally, as a way of putting this issue in perspective, we note that the District Court's assessment of the air and telephone service has fluctuated sharply over the years. In its 1972 decision in the *Aronson* case, the District Court upheld its continuing residence requirement for bar members based on such factors as congested airline flights and the Islands' isolation from the mainland. Eight years later, however, the District Court held that a national bank could be sued not merely where it was chartered, but anywhere it had a branch, including the Virgin Islands; the court dismissed out of hand any problems that mainland clients might have in reaching the Islands, explaining that "the advent of telecommunications, jumbo jets and data processing" services have stripped banks of any "justification for protective venue." *Tradewinds, Inc. v. Citibank, N.A.*,18 V.I. 93, 98 (D.V.I. 1980).[13] Six years later, when the District Court decided this case, it did not ex-

[13]The Third Circuit reversed the decision in an unpublished opinion, but that fact does not diminish our citation of this case. The court of appeals did not disagree with the district court's assessment, but two of the three

plain why these services had deteriorated to such a point that a "protective" law for local lawyers was proper.

In short, whatever problems may exist with respect to air service or communications between the Islands and the mainland, they are not sufficient to justify a ban on non-resident bar members, and there is no basis to ventilate these issues at a trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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judges thought that the case was controlled by a prior panel ruling which could only be reversed by the *en banc* court; the third judge would have affirmed the district court. No. 81-1424 (27 July 1981).